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Legal Issues in Brownfields Transactions: Getting to the Goal Line Without Getting Tackled

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March, 2011*

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Sellers Want to...

- *Maximize* sales price.
- *Minimize* extent of cleanup (or sell “as is”).
- Make their cleanup obligations specific and narrow.
- Avoid liability to anyone.

Buyers Want to...

- *Minimize* purchase price.
- *Maximize* extent of cleanup.
- Make cleanup obligations of Seller broad.
- Avoid liability to anyone.
- Make a profit by developing or flipping the property.

Who Should be on the Buyer's Team?

- Top-notch environmental consultant.
- Experienced environmental attorney with transactional experience.
- Insurance broker with environmental expertise.

How Can the Buyer Protect Itself?

- Bona fide Prospective Purchase Defense.
- Phase I ESA/Phase II ESA.
- Prospective Purchaser Agreements / Comfort Letters.
- Indemnity from Seller.
- Pollution Legal Liability Insurance.
- VRP Certificate of Satisfactory Completion.

Liability “Landmines” for Buyers

- Phase I ESA does not comply with EPA regulations or ASTM Standard.
- Losing BFPP Status.
- Possibility of RCRA Corrective Action.
- Unfiled CERCLA Liens.
- Indemnitor has no money.
- PLL insurance coverage fails.
- Third party claims.

ASTM E 1527-05 Phase I ESA Pitfalls

- 35 pages, single-spaced.
- User Responsibilities not met.
 - *Title search for AULs.*
 - *Actual knowledge of AULs.*
 - *Specialized knowledge or experience.*
 - *Commonly known or reasonably ascertainable information.*
 - *Reason for having Phase I performed.*
 - *Purchase price paid vs. FMV if uncontaminated.*

continued...

- Interviews are insufficient; Report doesn't confirm questions asked.
- Phase I ESA is > 1 year old.

continued...

- 180 day update requirement is not met.
 - *Interviews*
 - *Recorded liens*
 - *Records review*
 - *Visual inspections*
 - *Declaration of EP*

Buyer Maintains BFPP Status as Long as it...

1. does not dispose of hazardous substances on the property;
2. provides legally required notices;
3. takes “reasonable steps” with respect to hazardous substance releases;
4. provides cooperation, assistance and access;

continued...

5. complies with land use restrictions and institutional controls;
6. complies with information requests and administrative subpoenas; and
7. does not impede any response action or natural resource restoration.

Losing BFPP Status – Monday Morning Quarterbacking

Ashley II of Charleston, LLC (D.S.C.
9/30/10)

- First case interpreting BFPP defense.
- Brownfields developer bought site, but failed to meet “reasonable steps” requirement.
- Didn’t cleanout sumps, remove debris pile, or maintain soil capped area.
- Developer was apportioned 5% of > \$8 million in costs.

Continued...

3000 E. Imperial, LLC (C.D. Col.
12/29/10)

- Purchaser acquired aircraft and rocket manufacturing site.
- TCE/benzene had leaked from USTs.
- 6 months after purchase: sampled and drained tanks – 2 yrs. to remove tank.
- BFPP status applied.

RCRA Corrective Action is Lurking

- Facility filed a Part A application for TSD permit, even if withdrawn.
- Facility should have obtained interim status or a TSD permit, but didn't do so.
- VRP certificate is no bar to RCRA Corrective Action.

Unfiled CERCLA Liens - Response Cost Lien

- CERCLA § 107(I) Response Cost Lien.
 - *Owner must have liability for response costs.*
 - *Arises on earlier of:*
 1. *Date on which U.S. gives notice of potential liability.*
 2. *Date on which U.S. first incurs response costs.*

continued...

- *Lien exists until response costs are paid or statute of limitations runs (3 yrs. from completion of removal action; 6 yrs. from initiation of on-site construction for remedial action.) See 42 U.S.C. § 9613(g)(2).*
- *No priority unless EPA records the lien.*

Unfiled CERCLA Liens - Windfall Lien

- CERCLA § 107(r) Windfall Lien
 - *Designed to avoid inequity of BFPP getting benefits of EPA cleanup at no cost.*
 - *Arises by operation of law when U.S. first incurs response costs.*
 - *Exists until it is satisfied by sale of the property or until U.S. is paid all of its response costs.*

continued...

- *No statute of limitations applies. 42 U.S.C. § 9607(r)(4)(C).*
- *Limited to lesser of:*
 1. *EPA's unrecovered response costs,*
or
 2. *Increase in FMV attributable to*
response action.
- *EPA not inclined to file if cleanup complete before BFPP buys.*

Indemnitor Has No Money

- Indemnity for:
 - *Existing contamination*
 - *Third party claims*
 - *Unknown contaminants*
 - *Re-openers*
- For What? How much? How long?
- Indemnity is only as good as the Indemnitors' bank account.

continued...

- Watch out for single purpose LLCs!
- Get multiple Indemnitors.
- PLL policy may be a good backstop.

Typical PLL Coverage

COVERAGE A – ON-SITE CLEAN-UP OF PRE-EXISTING CONDITIONS

1. To pay on behalf of the **Insured, Clean-up Costs** resulting from **Pollution Conditions** on or under the **Insured Property** that commenced prior to the **Continuity Date**, if such **Pollution Conditions** are discovered by the **Insured** during the **Policy Period**, provided:

continued...

- (a) The discovery of such **Pollution Conditions** is reported to the Company in writing as soon as possible after discovery by the **Insured** and in any event during the **Policy Period** in accordance with Section III. of the Policy.

Discovery of **Pollution Conditions** happens when a **Responsible Insured** becomes aware of **Pollution Conditions**.

continued...

- (b) Where required, such **Pollution Conditions** have been reported to the appropriate governmental agency in substantial compliance with applicable **Environmental Laws** in effect as of the date of discovery.

PLL Insurance Coverage Fails

- Exclusions can be hidden in definitions, “Clean-up Costs” does not mean all such costs.
- No cleanup is required by environmental laws and/or no government agency has required cleanup.
- Both buyer and seller are insureds under the policy (“insured v. insured” exclusion)

continued...

- The claim arises out of contractual liability (“contractual liability” exclusion).
- You are an “Additional Insured,” not a “Named Insured.”

Third Party Claims

- Nature of contaminants.
- Off-site migration.
- Vapor intrusion.
- Receptors.
 - *Anyone using groundwater?*
 - *Sensitive environments.*

Buyer v. Seller Cleanup Issues

- Who controls the cleanup?
- How clean is clean?
 - *Non-residential vs. residential*
 - *Restrictive covenants.*
 - *Seller to pay for no more than is required to meet standards.*
- What happens if buyer will conduct same activities? Commingling.

continued...

- Who is responsible for O&M and for how long?
- What happens if buyer/seller does not perform as promised?
- Who gets results and reports? Comment allowed on draft reports.
- Will both parties get to negotiate with the agency?
- What happens if site is not eligible for VRP?

continued...

- Who takes the risk of unknown contamination?
- Can buyer voluntarily investigate the property?
- Access/interference with operations.
- When is the cleanup deemed complete?
- Limitation of remedies.

The Key to Success is to...

- Understand the nature and extent of contamination at the site.
- Identify the risks.
- Minimize the risks.
- Have a plan if the risks materialize.

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